STATE OF MICHIGAN

COURT OF APPEALS

In re ANDREW LAWRENCE LOYD EATON, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW LAWRENCE LOYD EATON,

Defendant-Appellant.

UNPUBLISHED
November 22, 2005

No. 257010
Muskegon Circuit Court
Family Division
LC No. 03-031806-DJ

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his conviction for one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a). We affirm.

Defendant was charged with a single count of sexual misconduct arising from an act of fellatio with an eleven-year old classmate. The complainant was not certain of the date of the incident, testifying that it was sometime after October 14, 2002 and while there was snow on the ground. Defendant was born on December 8, 1989; thus he was either twelve or thirteen at the time of the incident. Plaintiff charged defendant with first-degree criminal sexual conduct and designated defendant for trial as an adult, pursuant to MCL 712A.2d(1).

At the time of the incident, defendant and the complainant attended the same school. At trial, the complainant testified that while she was at school attending evening activities, defendant grabbed her, took her to an empty classroom and made her engage in fellatio. After the jury found defendant guilty, the trial court sentenced defendant as a juvenile.[1]

[1] "Following a judgment of conviction in a designated case, MCL 712A.18(1)(n) provides a judge with the option of imposing either a juvenile disposition, an adult sentence, or a blended sentence, i.e., a delayed sentence pending defendant's performance under the terms provided by a juvenile disposition." *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

Defendant argues that the prosecutor abused its discretion, committing prosecutorial misconduct and violating defendant's equal protection rights, by charging defendant as an adult. We disagree. The prosecutor has broad charging discretion and this Court's review of the prosecutor's exercise of that discretion is limited to whether an abuse of power occurred; that is, whether the charging decision was made for reasons that are unconstitutional, illegal, or ultra vires. *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999), citing *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). However, because defendant failed to preserve this issue by raising it before the trial court, this Court's review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCL 712A.2d(1) provides:

> In a petition or amended petition alleging that a juvenile is within the court's jurisdiction under section 2(a)(1) or this chapter for a specified juvenile violation, the prosecuting attorney may designate the case as a case in which the juvenile is to be tried in the same manner as an adult.

First-degree criminal sexual conduct is a "specified juvenile violation." MCL 712A.2d(9)(a). As this Court explained in *Conat, supra* at 149,

> It is well settled that "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). Prosecutors must often choose among various applicable criminal statutes in deciding which charges to bring against a defendant. Indeed, the prosecutor is a constitutional officer entrusted with performing the executive function of bringing criminal charges against defendants. See *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683-684; 194 NW2d 693 (1972); *People v Siebert*, 450 Mich 500, 510; 537 NW2d 891 (1995) (BOYLE, J.) (noting that the prosecutor "is constitutionally entrusted with authority to charge defendants"). This is grounded in the responsibility of the executive branch to enforce the laws. See US Const, art II, § 3 (requiring the President to "take Care that the Laws be faithfully executed"). The prosecutor is given broad charging discretion, *Genesee Prosecutor, supra* at 683, and judicial review of the exercise of that discretion is limited to whether an abuse of power occurred, i.e., whether the charging decision was made for reasons that are unconstitutional, illegal, or ultra vires. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996).

A prosecutor properly exercises his charging discretion when the charge brought is supported by the facts, *People v Yeoman*, 218 Mich App 406, 414; 554 NW2d 577 (1996), and the decision to bring that charge was not made for reasons that are unconstitutional, illegal or *ultra vires*. *Barksdale, supra* at 488. Further, in *Conat, supra* at 155-157, this Court explained that

> . . . [I]n order to successfully claim that the exercise of prosecutorial charging discretion constitutes a violation of equal protection guarantees, a defendant must demonstrate that the prosecutor singled out certain defendants for

> prosecution while not charging others similarly situated who committed the same crime and that this decision was based on impermissible factors such as race, sex, religion, or the exercise of a fundamental right. *People v Maxson,* 181 Mich App 133, 135; 449 NW2d 422 (1989), quoting *People v Ford,* 417 Mich 66, 102; 331 NW2d 878 (1982). . . . Without a showing of intentional discrimination based on impermissible factors, the mere fact that some persons are charged differently from others for the same conduct does not violate equal protection. *Maxson, supra* at 134-135.

Defendant makes no assertion that the decision to designate him for trial as an adult was a result of intentional discrimination based on constitutionally impermissible factors. Therefore, he cannot establish that his equal protection rights were violated. Further, the *Conat* Court found that, in the absence of a showing of such impermissible discrimination, the analogous statutory system for automatic waiver to circuit court for trial as an adult does not violate federal and state guarantees of equal protection. *Id.* at 153, 157. The Legislature in MCL 712A.2d(1) has vested the prosecutor with sole discretion to designate a juvenile for trial of specified juvenile violations in the same manner as an adult and this Court has already rejected the claim such discretion renders the statute unconstitutional. *People v Abraham*, 256 Mich App 265, 282-283; 662 NW2d 836 (2003). The prosecutor's exercise of that discretion is appropriate unless motivated by constitutionally impermissible or illegal reasons. Defendant does not establish that the decision to try him as an adult was motivated by any such reason. Therefore, he cannot establish plain error affecting his substantial rights.

Defendant also argues that he is entitled to specific performance of a purported plea offer to allow him to plead guilty to first-degree criminal sexual conduct as a juvenile and avoid trial as an adult, which he attempted to accept the morning of trial. Again, we disagree. Ordinarily, this Court reviews a trial court's decision regarding enforcement of a plea agreement for clear error. *People v Hannold*, 217 Mich App 382, 389; 551 NW2d 710 (1996). But, again, this issue was not raised in the trial court, so this Court's review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

As this Court explained in *In re Robinson,* 180 Mich App 454, 459; 447 NW2d 765 (1989),

> A defendant's right under *Santobello v New York*, 404 US 257; 92 S Ct 495; 30 L Ed 2d 427 (1971), to have the prosecutor perform his promise in a plea bargaining agreement does not inure to a defendant until after he has pled guilty or performed part of the plea agreement to his prejudice in reliance upon the agreement. *[People v] Heiler,* [79 Mich App 714, 719, n 4; 262 NW2d 890 (1977)]. *Santobello* and its progeny do not involve court-compelled performance of a tentative agreement from which the prosecutor has withdrawn prior to judicial approval.

In *In re Robinson,* the defendant claimed that he accepted an offer to plead guilty to second-degree murder, but asked to be allowed to enter a nolo contendere plea; the prosecutor declined. The defendant unsuccessfully sought specific performance of the purported plea agreement in the trial court, and this Court affirmed, noting that, "[a] trial court acts improperly when it reinstates a plea bargain unless the prosecutor can be said to have abused his discretion by withdrawing

from the plea agreement or prejudice to the appellant can be shown." *Id.* at 458 (citing *Heiler, supra* at 719). This Court concluded that the prosecutor did not abuse his discretion in withdrawing his plea offer, that no final plea agreement had been reached, and that the defendant had failed to show that he acted in reliance on the prosecutor's plea offer in an manner that might prejudice his defense, noting specifically that the defendant did not plead guilty nor made any statement in reliance on the plea agreement. *In re Robinson, supra* at 459.

Similarly, in the instant case, there is no factual basis in the record for concluding that any plea agreement was reached between the parties. In support of his argument, defendant offers the affidavit of his trial counsel, Shon Cook, who avers that the plea offer was made, that defendant and his parents did not decide to accept the offer until the morning of trial and that at that time, the prosecutor refused to accept the plea agreement, instead indicating that the offer was withdrawn. However, that affidavit was not submitted to the trial court, and this Court will generally not allow expansion of the record on appeal. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), aff'd in part rev'd in part on other grounds 462 Mich 415; 615 NW2d 691 (2000). Further, even had such agreement been reached, the prosecutor could have withdrawn from the agreement before judicial approval absent defendant's acting in reliance on the agreement to his detriment. *Heiler, supra* at 719-721. Clearly, there was no such reliance in the instant case. Defendant did not plead guilty or make any statement in reliance on the plea offer, and defense counsel had filed motions and prepared for trial. Under such circumstances, if presented with the issue, the trial court would have erred by enforcing any plea offer; therefore, defendant cannot show plain error affecting his substantial rights.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey